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Supreme Court, U.S.
FILED

No. 97 693 OCT 21 1997

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IN THE SUPREME COURT OF THE UNITED STATES

Fall Term, 1997

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Petitioners,

v.

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

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85 pp

QUESTION PRESENTED

When police actors shield from the public and a victim's family key facts which would form the basis of the family's civil claim for redress, is there a deprivation of the due process right of access to the courts?

PARTIES TO THE PROCEEDING

The parties before the court of appeals were Delores Swekel, Gregory Harrington, William Abair, Johnson Taylor, William Cooper and David Israel.

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Petitioners, Delores Marie Swekel, Personal representative of the Estate of Arnold F. Swekel ("Swekel"), respectfully request that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as electronic citation 1997 FED App. 0223P (6th Cir.)

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") was entered on July 23, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law. . ."

STATEMENT OF THE CASE

The fundamental question in this case is: How does a court assess whether a litigant's guarantee of adequate, effective, and meaningful access to the courts has been violated when state actors shield from the victim's family key facts that are necessary for success in a civil action for damages. It arises in the context of Swekel's claim, against certain River Rouge police officers, for a police cover-up and destruction of evidence amounting to denial of access to the courts in violation of 42 U.S.C. § 1983. Swekel's claim was dismissed by the Sixth Circuit on the ground that Swekel's underlying wrongful death claim was not completely destroyed by the police cover-up since she did not establish that the state court could not adequately deal with any problems of delay caused by the police

officers' cover-up and destruction of evidence. To fully appreciate the importance of the issues presented by this case, it is essential to consider the background of the case.

A. Background

On September 30, 1988, at approximately 11:00 p.m., Arnold F. Swekel attempted to cross a street in River Rouge, Michigan. While he was crossing the street, either one or two cars speeding down the street hit and fatally injured Mr. Swekel.

After the accident, a River Rouge police officer, Dwight Black, went to the scene and interviewed witnesses. Four witnesses told Officer Black that two cars were involved in the accident. Officer Black then filed a police report that provided a description of the two vehicles involved. After filing the report, Officer Black was removed from the case. Additionally, the daily log sheets, which were ordinarily retained in the police records, mysteriously disappeared. The daily log sheet would reveal that the accident was originally reported as involving two vehicles.

Mr. Swekel was in the hospital for seventeen days before he passed away on October 17, 1988. Delores Swekel, the widow and

personal representative of the estate of the decedent, repeatedly requested that the police interview her fatally injured husband in the hospital, but the police declined to do so.

Swekel alleged that members of the River Rouge Police Department ("Defendants") engaged in an immediate cover up of the second driver because the driver was the son of a high ranking police officer. Swekel based these allegations on witness reports that two vehicles were involved in the accident, with all evidence pointing towards the high ranking police officer or his son as being one of the drivers. Swekel alleged that the police never investigated whether the second driver was the high ranking police officer or his son. These allegations of non-investigation were based on: (1) Defendants' failing to perform forensic tests on the victim's clothing; (2) Defendants' disregarding the responding officers report that two cars were involved; (3) the responding officer, contrary to custom, being told not to attend the preliminary hearing; (4) Defendants' ignoring anonymous tips stating that Russell Kulinski, a police commander at the time of the accident, or his son, Todd was one of the drivers who struck Mr. Swekel; (5) Defendants' refusal to investigate the link between the

Kulinskis and the second driver; (6) Defendants' refusal to interview Todd Kulinski; and (7) Defendants' failure to disclose to Swekel the anonymous tips implicating the Kulinskis despite the fact Swekel told the police she suspected Todd Kulinski.

Swekel successfully pursued a wrongful death action against the first driver. Swekel was precluded from bringing a second wrongful death action against the second driver because Defendants concealed key facts that would have provided the basis of her claim for redress. Since the police failed to investigate the identity of the second driver, Swekel never learned any concrete facts which clearly established the identity of the second driver prior to the expiration of the Michigan statute of limitations. Swekel's attorney at the time stated that when the statute of limitations expired he lacked sufficient factual basis to file suit against the second driver because of the police cover-up. He believed that it would be an ethical violation to file suit based on mere rumors and speculation. Accordingly, since Swekel's attorney was aware of Defendants' lack of investigation, he opted to file suit under 42 U.S.C. § 1983 claiming that the police cover-up denied Swekel access to the courts.

In reviewing the injustice of this case, it is worth noting that Swekel's claim is unlike most cover-ups where a death is caused by a state actor. A typical cover-up simply hides how the death actually occurred, not the parties involved; thus, the victim's family will already know who they might sue. What the victim's family does not know is the strength of their case. Swekel's situation is different in that what was hidden was not the way the incident occurred with a known perpetrator but the way the incident occurred as well as the identity or even existence of the perpetrator.

B. The Proceedings Below.

Swekel's federal case for denial of access to the courts was set to go to trial on May 15, 1995. On May 11, 1995, the district court ordered Swekel to show cause why it should not dismiss the case in light of *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (holding that plaintiff was not denied access to courts if she could file a viable suit in state court). Swekel argued to the district court that Defendants' cover-up of the identity of the second driver caused the statute of limitations to run and thus amounted to her being barred from legally filing suit. The district court stated that Swekel could

have filed a "John Doe" lawsuit against the second driver and then later amended it when she discovered the identity of the second driver. Despite the fact that a "John Doe" suit would not have tolled the statute of limitations in Michigan, *see e.g. Fazzalare v. Desa Indus., Inc.*, 135 Mich. App. 1, 6 (1984), the district court reasoned that with the aid of discovery Swekel may have been able to discover the identity of the second driver. The court also reasoned that such discovery might occur prior to expiration of the statute of limitations. Consequently, the district court granted summary judgment in favor of Defendants *sua sponte*. Swekel moved for reconsideration, which the district court denied. The district court noted that *Joyce* held that no underlying constituional violation ever occurs when a police cover-up fails to prevent a plaintiff from filing suit. The court further stated "Joyce is still the law, . . . even though other district courts have in effect undermined it . . . So, then this court will dismiss this case, and I assume that plaintiff will promptly appeal, and I think you should." *Transcript of Hearing on Trial court's Order to Show Cause*, Appendix Document 5 at 14.

Swekel then timely filed an appeal with the Sixth Circuit. The Sixth Circuit held that, despite the district court's reliance on *Joyce* as the basis for dismissing Swekel's claim *sua sponte, Joyce* was not dispositive of this case. The Sixth Circuit held that since *Joyce* involved alleged post-filing abuses whereas Swekel's case involved pre-filing abuses; therefore *Joyce* was not controlling. Despite this finding, the Sixth Circuit still affirmed the district court's ruling because Swekel never presented evidence that the state court could not adequately address the actions of the defendant police officers. The Sixth Circuit realized that the police cover-up may have prejudiced Swekel's ability to recover in state court. Despite recognizing this potential prejudice, the Sixth Circuit disregarded the prejudice. The Sixth Circuit reasoned that the plaintiff bears the burden of presenting evidence that defendants' actions actually rendered any available state remedy ineffective. The court further held that, since Swekel had not filed a state court action, the court could not assess whether access was meaningful and effective.

The import of the opinion below is clear. The Sixth Circuit refuses to sustain a claim for denial of access based on police cover-up

unless the plaintiff first filed suit against the unknown defendant. This leads to the inescapable conclusion that if a police cover-up successfully hides the true facts from the victim's family until the statute of limitations has run, then the victim's family is without redress. Under the Sixth Circuit's ruling, a remedy under § 1983 would not be available in the case of the most successful type of cover-up: the one in which the victim or his family is left with too little information to support the filing of a lawsuit within the statute of limitations period. Only where the cover-up is unsuccessful will there be remedy under § 1983. Though the opinion below indicates that in such a situation the remedy will be in state court. The ruling below will reward and encourage the most successful cover-ups. Thus, although purporting to recognize the right to access in police cover-up cases, the Sixth Circuit has placed such burdens and obstacles on the plaintiff that it has effectively precluded any claim for denial of access to the courts where the police cover-up of the facts of a crime is extremely effective.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS' PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT'S RIGHT TO ADEQUATE, EFFECTIVE, AND MEANINGFUL ACCESS TO THE COURTS.

Swekel's petition for writ of certiorari should be granted because the opinion below conflicts with other circuits' prior rulings on a litigant's fundamental due process right of access to the courts. In clarifying this due process right, this Court has established that judicial access must be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72. (1977) (holding that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law)

Prisoners' rights to access the courts have been the subject of many cases, including Supreme Court cases. Thus, a prisoner's right

to access the courts is well defined. Though a majority of right to access cases are in the prisoner context, the right to access the courts has been extended beyond a prisoner's right to access the courts. The right is now implicated when state actors withhold key information from parties when the state actor is obligated in his official capacity to disclose the information. This extension encompasses a police cover-up. Though the right to access has been extended beyond prisoners' rights, what that right entails in such extended areas has not developed nor been defined in the same manner that a prisoner's right to access courts has been.

The extension of the right to access is recognized by several of the circuit courts in different factual situations. The Seventh Circuit stated "and therefore when police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged." *Bell v. City of Milwaukee* 746 F.2d 1205, at 1261. (1984) (holding that a twenty year police cover-up of an unlawful killing amounted to a denial of access.) The Fifth Circuit has held that "if state officers conspire . . . in such a way as to defeat or prejudice a litigant's rights

in state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law." *Dinwiddie v. Brown*, 230 F.2d 465, 469 (5th Cir.), cert. denied, 351 U.S. 971, 76 S.Ct. 1041, 100 L.Ed. 1490 (1956). The Fifth Circuit later stated "any interference with a substantive constitutional right, such as the right to access the courts, may by itself amount to a constitutional deprivation". *Ryland v. Shapiro,* 708 F.2d 967, 975 (1983). The First Circuit has held that "An individual certainly has at least as strong a need to know the key facts of his or her case in order to determine whether a colorable claim exists." *Germany v. Vance* 868 F.2d 9, 14 (1989). The Sixth Circuit Court of Appeals has also made clear that the right of access to the courts is a fundamental right found in the Due Process Clause. *See, Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir. 1986).

Though there is agreement among the circuits that the right to meaningful, adequate and effective access has been extended to include police officials withholding key information, the circuits are not in accord as to when a particular cover-up rises to a constitutional violation. In the case below, the Sixth Circuit held that "The plaintiff

must establish that such abuse denied her 'effective' and 'meaningful' access to the courts." *Swekel v. City or River Rouge*, Opinion of 6th Circuit page 9 Appendix Document 4. "She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had." *id*. The court below recognized the prejudice the police cover-up caused: "Swekel alleges that the police covered-up proof against one of their own, destroyed critical evidence and delayed Swekel's own investigation. These allegations, if true, would substantially prejudice Swekel's ability to recover in state court." *id* at10. Despite the recognition of the prejudice the court then stated "Swekel, however, never presented evidence that the state court could not adequately address these problems." *id*. Accordingly, the court below found no violation of Swekel's due process right to access the courts.

Judge George E. Woods the district court judge in Michigan who dismissed Swekel's action stated "It may well be that the United States Sixth Circuit Court of Appeals will hold or opine that the *Joyce* Opinion is not reasoned all that well, but because some might feel it

ignores what all other circuits have stated, or at least other circuits have stated, that is, access to the courts claim is viable whenever state actors may have interfered with a plaintiff's ability to pursue a claim. The state actors do not have to have destroyed the claim to have violated the Constitution."(emphasis added) *Trial Transcript* at 11. Though the Sixth Circuit did not decide this case based solely on *Joyce,* it did come to the same conclusion with a similar rational. In *Joyce* the Sixth Circuit required the plaintiffs to demonstrate a high degree of actual impairment of access before it will find that a plaintiff's right of access to the courts has been violated. Likewise in the case below the Sixth Circuit required Swekel to demonstrate a high degree of actual impairment of access; "Swekel bears the burden of showing that such actions foreclosed her from filing in state court." *Swekel,* at 10. No other circuit requires plaintiff to demonstrate such a high degree of impairment of access before finding a denial of access to the courts.

In direct contrast to the Sixth Circuit, the Seventh Circuit found a violation of the right to access in a related situation. "This constitutional right is lost where, as here, police officials shield from

the public and the victim's family key facts which would form the basis of the family's claim for redress." *Bell,* 746 F.2d at 1261. The Seventh Circuit later clarified what amounted to a violation of access "Not every act of deception in connection with a judicial proceeding gives rise [to a constitutional action]." The Seventh Circuit further held that " the cornerstone of our decision in *Bell* was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action rendering hollow the plaintiffs' right of access." *Vasquez v Hernadez,* 60 F.3d 325, 329 (7th Cir. 1995). Applying the *Bell* analysis to Swekel, it is clear that the Seventh Circuit would have found a constitutional violation since police officers shielded key facts from the victim's family. Also, under the more stringent standard in *Vasquez,* there would still be a constitutional violation since Swekel's right of access was rendered hollow. Since the Sixth Circuit and Seventh Circuit would reach different outcomes under identical facts, there is a split between these circuit courts which this Court should resolve.

Also in contrast to the Sixth Circuit, the Fifth Circuit has held that delay alone may constitute sufficient prejudice to amount to a

violation of access to courts. "Conduct by state officers which results in the delay in the prosecution of an action in state court may cause such prejudice . . . As we stated in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir.1980), cert. denied, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981): Delay haunts the administration of justice. . . . The most erratic gear in the justice machine is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination." *Ryland*, 708 F.2d at 974. (holding that the case should be remanded to allow plaintiff to establish that an eleven month delay constituted a constitutional deprivation and also to determine whether the constitutional deprivation caused any real damage.) Though not deciding that eleven months was sufficient to establish a violation of access, the Fifth Circuit recognized that an eleven month delay may be sufficient to establish a constitutional violation even though eleven months was a shorter time than the statute of limitations. Unlike the Fifth Circuit, the Sixth Circuit refused to allow the plaintiff, in the case below, the opportunity in court to establish whether a delay of three years, was a constitutional violation. This ruling was made

despite the fact that the three year period was longer than the statute of limitations. Therefore, once again, the Sixth Circuit is clearly in conflict with another circuit court. If the Fifth Circuit allows a plaintiff who suffered eleven months of delay the opportunity to establish a denial based on such a short delay, the Fifth Circuit would certainly afford that same opportunity to a victim of a three year delay.

Swekel's petition should be granted so that this Court may rectify this split among the different circuits. The conflict among circuits is clear; other circuits have stated that a claim is viable whenever state actors may have interfered with a plaintiff's ability to pursue a claim. The Sixth Circuit ignores and conflicts with these other circuits because it requires that the state actors destroy a claim before finding a constitutional violation. This split is also evident since in the case below the Sixth Circuit found no violation whereas had the case been brought in other circuits a violation would have been found. Accordingly, this Court should grant the petition so as to rectify this split among the circuits

II.
THE PETITION SHOULD BE GRANTED BECAUSE THE SUPREME COURT SHOULD ESTABLISH A STANDARD FOR COURTS TO APPLY WHEN DETERMINING WHEN STATE ACTORS COVERING UP CRUCIAL FACTS AMOUNTS TO A DENIAL OF ACCESS TO THE COURTS.

Swekel's petition for writ of certiorari should be granted because the question of when a police cover-up amounts to a denial of access to the courts is an important federal question which has not been settled by the Supreme Court. "Although the judiciary has long acknowledged the existence of the right of access to the courts it can best be described as nebulous." *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989). "While it is clear that a cover-up such as the one alleged in this case can result in a denial of access to the courts it is equally clear that there are circumstances under which a cover-up does not deny access to the courts." *Love v. Bolinger*, 927 F.Supp. 1131 (S.D.Ind. 1996). Despite the fact that a cover-up may or may not deny access to courts, there is no bright line test, no balancing test, nor any other uniform standard for courts to apply in order to determine whether a police cover-up is a constitutional violation. The resulting ad-hoc analysis used by courts has resulted in confusion and

conflict among circuits and even within circuits. Accordingly, the Court should take this opportunity to define a standard that will guide future cases of cover-ups in § 1983 cases.

The difficulty this lack of a standard or guidance causes has been noted in a recent Seventh Circuit case. In *Vasquez,* a case dealing with how long a delay was needed to constitute a denial of access, the Seventh Circuit found that, unlike a twenty year delay, a six month delay was not sufficient to constitute a constitutional violation. In a dissent it was noted. ["The majority raises the valid concern that the length of the delay was minimal and casts the Vasquezes' plight as insignificant compared to the decades-long cover up that prevented the *Bell* plaintiffs from bringing their suit. The majority's view is that the four month delay has not prevented the Vasquezes from bringing suit well before the statute of limitations expired and, therefore, should be seen as a deprivation unworthy of constitutional protection. My principal difficulty with this approach is that it provides no guidance on how future courts or litigants might analyze threats to access to the courts posed by a conspiracy of state actors."] *Vasquez*, 60 F.3d at 330.

"Rather than simply concluding that a situation does not compare favorably to *Bell*, or attempting to set temporal boundaries for determining whether a particular delay caused by a conspiracy of state actors passes constitutional muster, I believe that the analysis should encompass a variety of factors, including the length of delay, the reason for the delay, and the prejudice caused by the delay." *Vasquez*, 60 F.3d at 330.

In many police cover-up cases, courts equivocate as to what the requirements are in order for a plaintiff to establish a § 1983 claim. Certain words are prevalent in these cases, such as: "might", "may be", "could be" and "can be". Some examples of such language are: "Thus, a fact finder *could* conclude that the alleged conspiracy;" *Ryland*, 708 F.2d at 975 "The defendants' actions could have prejudiced the Rylands' chance of recovery;" *id* "Moreover, it *could well* prove more expensive;" *id* "*may* by itself amount to a constitutional violation;" *id*; "efforts by state actors to impede an individual's access to courts or administrative agencies *may* provide the basis for a constitutional claim" *Vasquez*, 60 F.3d at 328. Many cases quote this equivocal language found in *Ryland*.

Though such language is to be expected to a certain degree in any question that is not easily resolved, the prevalence of it and the context of the words indicate an underlying uncertainty as to how a court should resolve a denial of access claim in a cover-up situation. By adopting a more detailed and informative standard to guide courts, this Court could permanently remove such uncertainty.

Though one might think that this case is an aberration and does not present an important federal question, there are a surprising number of very similar cases of cover-ups by state actors. A sample listing of some cases not already discussed follows: *Gonsalves v. City of New Bedford*, 939 F.Supp 921 (D.Mass 1996). (police beating caused death of suspect and police then engaged in intentional cover-up so that a jury could not determine which officer was responsible for the beating); *Fisher v. City of Cincinnati*, 753 F.Supp. 681 (S.D. Ohio 1990); (Motorist who had been involved in collision with off-duty police officer brought action against other officers and the city alleging there had been a cover-up of the officer's intoxication); *Love*, 927 F.Supp.; (Survivors of deceased arrestee brought claims against coroner alleging cover-up of circumstances of arrestee's death);

Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994); (Parents alleged that city officials conspired to deny them access to court by concealing evidence during discovery); *In re Cincinnati Radiation Litigation*, 874 F.Supp. 796 (S.D.Ohio 1995); (Cancer patients sued Department of Defense physicians who subjected patients to radiation exposure then covered up the exposure); *Waechter v. School Dist. No. 14-030*, 773 F.Supp. 1005 (W.D.Mich 1991); (Handicapped student's parents brought claim alleging that recess supervisor, school district, school board, school board president, superintendent, and principal conspired to cover up death of student); *Agresta v. City of Philadelphia*, 801 F.Supp. 1464 (E.D.Pa. 1992); (parents of suspect gunned down by police brought claim that investigation into incident resulted in denial of access to courts); *Barrett v. United States*, 689 F.2d 324 (2nd Cir. 1982).

This partial list of recent cover-ups by state actors demonstrates that the question of when these cover-ups amounts to a constitutional violation is an important federal question. Likewise, it is important that this Court adopt a standard for all courts to apply to determine when a cover-up is a constitutional violation.

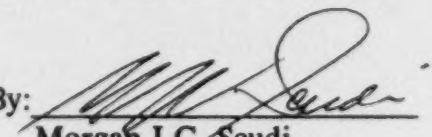
CONCLUSION

This case presents a question of exceptional importance --- whether a plaintiff must demonstrate that a police cover-up has destroyed the plaintiff's claim before there is a finding of a violation of the access the courts. If the opinion below is allowed to stand, Swekel, will have been denied due process and will forever suffer the consequences of the police cover-up. By granting Swekels' petition for certiorari, however, this Court can correct the Sixth Circuit's decision, which conflicts with other circuit's holdings that a police cover-up is a denial of access. In so doing, this Court can establish a standard that will lend meaningful guidance to the important question of the effect of deceptive acts by state actors and the right to access the courts. Accordingly, Swekel respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted

Dated: October 10, 1997

HUTH, LYNETT & SCUDI

By: 

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